DEC 14 1925

No. 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

OLD COLONY TRUST COMPANY, as Trustee,
Appellant,

—vs.—

THE CITY OF SEATTLE, COUNTY OF KING, W. W. SHIELDS, as Treasurer, and MATT STARWICH, as Sheriff of King County,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. EDWARD E. CUSHMAN,
United States District Judge

MOTION TO DISMISS APPEAL
AND
BRIEF OF APPELLEES

EWING D. COLVIN,
HOWARD A. HANSON,
Counsel for Appellees, except The City of Seattle.
431 County-City Building,
Seattle, Washington.

THOMAS J. L. KENNEDY,
GEORGE A. MEAGHER,
Counsel for Appellee, The City of Seattle,
527 County-City Building,
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THE ARGUS PRESS, SEATTLE

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MOTION TO DISMISS APPEAL

Appellees hereby move this court to dismiss the appeal as to them and each of them for the following reasons:

I.

That because the taxes have been paid there is now no actual controversy involving real and substantial

rights between the parties, and no subject matter upon which the judgment of this court can operate.

II.

The appeal is frivolous.

This motion is based upon the records and files in the above entitled cause and the affidavits of appellees W. W. Shields, as Treasurer of King County and Matt Starwich as Sheriff of King County and the affidavit of Howard A. Hanson, solicitor for such appellees, said affidavits being appended to this motion as Exhibits "A", "B" and "C".

STATEMENT

Appellant seeks to enjoin the enforced collection of a tax against another and to require the specific performance of a contract to which it is not a party (R. 15).

In 1919 a personal property tax of $401,017.76 was levied against the operating property comprising the street railway system in Seattle, Washington, and charged to the then owner, the Puget Sound Power & Light Company, which, after the lien of the tax had attached, conveyed the property to the City of Seattle. The validity of the tax was sustained in

Puget Sound Power & Light Company v. Seattle, et al., 117 Wash. 351;

Puget Sound Power & Light Company v. Seattle, et al., 264 U. S. 22, 68 L. Ed. 541.

When the remittitur finally came down to the trial

court from this court the county treasurer was unable to collect in due course. He then prepared and filed papers in distraint with the sheriff, who, pursuant to Sec. 11258 Rem. Comp. Stat., distrained sufficient goods and chattels belonging to the person charged with such taxes to pay the same with interest and accruing costs and fixed June 10, 1924, as the date of sale under such distraint proceedings (R. 12). Sec. 11258 is set forth in full in the Appendix pp. 81-87. The taxpayer, Puget Sound Power & Light Company sought in the District Court to enjoin the distraint and sale proceedings (See affidavit of Howard A. Hanson, Appendix, pp. 71-75).

Appellant brought this action as a separate suit against the same parties seeking the same relief. It alleged that it was trustee for the bond holders under a mortgage given by the taxpayer which covered among other property the goods and chattels distrained (R. 3). It did not disclose the terms of its trust by setting up a copy of the mortgage as part of its bill. It did not allege insolvency of the mortgagor, nor of any of the defendants. It alleged the validity of the tax and that it was for state as well as other purposes (R. 3). It alleged that when the mortgagor sold its street railway system to the City such parties contracted to share in the payment of this tax (R. 3); that the mortgagor had asked the City to pay its share but was refused; that the taxing officers looked to the mortgagor as the taxpayer for the total tax and on failure to collect had distrained. It prayed that the

distraint be enjoined and that the City be compelled to pay to the taxpayer under the contract its share of the tax money.

The distraint was not against the specific property assessed, but under Sec. 11258 Rem. Comp. Stat. was against "sufficient goods and chattels belonging to the person charged with such taxes * * * to pay the same * * *."

Under the local law personal property taxes are a debt of the person assessed:

Porter v. Yakima County, 77 Wash. 299;

Clizer v. Krauss, 57 Wash. 26;

Lewis Construction Co. v. King County, 60 Wash. 694;

Mills v. Thurston County, 16 Wash. 378;

Dingle v. Camp, 121 Wash. 393.

In making distraint, the sheriff is not limited to the property assessed, but may distrain any personal property belonging to the tax debtor within the county sufficient in amount to meet the taxes, together with interest and costs.

Porter v. Yakima County, 77 Wash. 299;

Thompson v. Roe, 63 U. S. 422, 16 L. Ed. 387.

Appellant claimed, however, that distraint should have been confined to the specific property assessed, that the distraint had cast a cloud upon its mortgage security, that it would suffer great irreparable loss and damage and had no adequate remedy at law. Appellant prayed, in the event it paid such taxes, for

subrogation to the lien thereof, and that the City pay to appellant such amount.

In addition to the County and its taxing officers, the City of Seattle was made a party defendant in both suits. The cases were argued together before District Judges Neterer, Cushman and Bourquin. On June 5, 1924, the decisions were rendered in each case refusing injunctions and granting the motions to dismiss. See R. 20 as to case at bar. As to taxpayer's suit see

Puget Sound Power & Light Company v. Seattle, et al., 300 Fed. 441.

The mortgagee (appellant herein) refused to plead further and took this appeal from the order of dismissal. *On June 7, 1924, the tax was paid in full with interest and costs* (See affidavits attached to Motion to Dismiss (Appendix pp. 71-80 herein).

The mortgagor, however, in its suit elected to plead further and filed an amended and supplemental bill omitting the county and its taxing officers as parties defendant, pleading that the tax had been paid and continuing the suit against the City of Seattle alone, seeking payment of a portion of the amount involved in the tax on account of certain agreements between the City and the taxpayer made in 1919 when the City purchased from it the street car system in Seattle. This amended and supplemental bill was dismissed on motion. On appeal of the mortgagor's suit, the Circuit Court of Appeals affirmed the dismissal as to the County and its taxing officers and reversed

the case as to the City, saying, after reviewing the facts:

> "In view of the payment of the taxes, the company does not suggest that it is entitled to any relief as against the county or its officers, aside from subrogation to the tax lien; nor do we think it is entitled to any further relief as against them.
>
> "The decree is therefore reversed as to The City of Seattle and affirmed as to the other appellees, and the case is remanded to the court below for further proceedings in accordance herewith."
>
> *Puget Sound Power & Light Co. v. Seattle, et al.* (C. C. A.), 5 Fed. Rep. 2d Series, 393.

Thereafter this court, on October 19, 1925, denied a writ of certiorari to review such decision of the Circuit Court in the taxpayer's suit (p. 75 this brief).

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

I.

THAT BECAUSE THE TAXES HAVE BEEN PAID THERE IS NOW NO ACTUAL CONTROVERSY INVOLVING REAL AND SUBSTANTIAL RIGHTS BETWEEN APPELLANT AND THESE APPELLEES, AND AS TO THEM NO SUBJECT MATTER UPON WHICH THE JUDGMENT OF THIS COURT CAN OPERATE.

The controversy is ended, and the question is moot. The tax has been paid. The date set for the sheriff's

distraint sale, June 10, 1924, has passed. No sale was had on that date because of prior payment of the tax (see affidavit p. 78 herein). The sheriff's power to sell ceased when payment was made. There is nothing to enjoin. Such is the status of the injunction suit brought by the taxpayer itself. Its right, however, to proceed against the City is unaffected by the termination of the controversy as to the County and its taxing officers.

Now, in the case at bar, appellant is not the tax debtor but a trustee for bond holders under a mortgage, the lien of which embraces personal property covered by the sheriff's notice of distraint. It does not disclose its mortgage, nor plead that it is in possession or entitled to the possession of the property distrained, nor that the tax debtor is insolvent nor that defendants are insolvent. Yet it seeks to stay the hand of the tax collector against a solvent tax debtor and to compel payment of a private contract to which it is not a party.

The right of a mortgagee to compel performance of a money contract between the mortgagor and another does not exist. It is brought forward, however, as an illary to the claimed right of a mortgagee to enjoin the taxing officials from forcing the mortgagor to pay its valid tax debt. This claimed right does not exist. But, even if it did, it fell with the tax payment and with it disappeared the non-existent, ancillary right to compel performance of the contract between the mortgagor and the City. The court in the other

suit, will determine the rights under the contract as between the parties thereto.

As to the suit at bar, the threatened sale for taxes cannot be enjoined, because the time has passed. It did not happen and never can. Enforcement of the contract cannot be had by one not a party thereto. Subrogation cannot be had for obvious reasons. The mortgage is not before the court; payment of the tax, or any part of it, by the mortgagee is a mere contingency, not a fact, so far as this record shows. The certified check (p. 69) shows that the tax debtor paid the tax. If, in this payment, there in fact was mortgagee's money (advanced quite apart from any usual appropriate stipulations as to tax payments in such a mortgage) and if the mortgagee by reason thereof had expected to assert in this suit a right of subrogation, it should have filed in this case an amended or supplemental bill alleging such actual payment. Instead, the record discloses (R. 21) that solicitors and counsel for plaintiff in open court applied for and were granted leave of court until June 7, 1924, to file an amended or supplemental bill of complaint herein, and on June 7, 1924, the day the tax was paid, they announced in open court that no amended or supplemental bill of complaint would be tendered or filed on behalf of the Old Colony Trust Company, Trustee, and that said plaintiff refused to plead further. Plaintiff in each of these suits was represented by the same counsel, Mr. Howe as attorney, verifying the pleadings in the suit at bar. Hence there is now no

actual controversy involving *real and substantial rights* between the parties to this record, and there is no subject matter upon which the judgment of this court can operate. (See affidavits pp. 71-80 herein).

Puget Sound Power & Light Company v. Seattle, et al., 5 Fed. Rep. 2d Series, 393;

Mills v. Green, 159 U. S. 651, 40 L. Ed. 293;

Singer Manufacturing Co. v. Wright, 141 U. S. 696, 35 L. Ed. 906;

Little v. Bowers, 134 U. S. 547, 33 L. Ed. 1016;

Selden v. Montague, 194 U. S. 153, 48 L. Ed. 915;

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Tennessee ex rel. Maloney v. Condon, 189 U. S. 64, 47 L. Ed. 709;

Atherton Mills v. Johnston, 259 U. S. 13, 66 L. Ed. 814.

In *Mills v. Green, supra*, Mr. Justice Gray observed, pp. 653-654:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence.
>
> "* * * if the intervening event is owing, either to the plaintiff's own act, or to a power beyond the control of either party, the court will stay its hand."

In *Singer Manufacturing Co. v. Wright*, 141 U. S. 696, 35 L. Ed. 906, Mr. Justice Field stated, p. 700:

> "The taxes being paid, the further prosecution of this suit to enjoin their collection would present only a moot question, upon which we have neither the right nor the inclination to express an opinion.

"This subject was considered somewhat at length in *Little v. Bowers*, 134 U. S. 547 (33: 1016). The payment of the taxes was, it is true, made under protest, the complainant declaring at the time that they were illegal, and that it was not liable for them; that the payment was made under compulsion of the writs; and that it was intended to demand, sue for, and recover back the amounts paid. If this enforced collection and protest were sufficient to preserve to the complainant the right to proceed for the restitution of the money, upon proof of the illegality of the taxes, such redress must be sought in an action at law. It does not continue in existence the equitable remedy by injunction which was sought in the present suit. The equitable ground for the relief prayed ceased with the payment of the taxes.

"*The appeal must therefore be dismissed; and it is so ordered.*"

In *Cheong Ah Moy v. U. S.*, 113 U. S. 216, 28 L. Ed. 983, the court declared, p. 218:

"The question, therefore, which we are asked to decide is a moot question as to plaintiff in error, and if she was permitted to give bail it could be of no value to her, as the order by which she was remanded has been executed, and she is no longer in the custody of the marshal or in prison.

"This court does not sit here to decide questions arising in cases which no longer exist in regard to rights which it cannot enforce.

"*The writ of error is dismissed.*"

II.

The Appeal is Frivolous in View of Previous Decisions on the Subject

The order of dismissal (R. 21) was "upon the ground that the court is without jurisdiction as a federal court."

The certificate to this court states (R. 22):

"* * * this certificate is made and granted and the question of the jurisdiction of the suit by the District Court as a Federal Court and the correctness of the ruling and decree of the District Court that as a Federal Court it was and is without jurisdiction to entertain the suit are hereby certified to the Supreme Court of the United States for decision upon such appeal."

Appellant's fourth assigned error (R. 24) is:

"* * * in sustaining the motions of the defendants to dismiss the above entitled suit for want of jurisdiction and in dismissing the above entitled suit for want of jurisdiction in such Court as a Federal Court."

It also assigned errors by reason of the Eleventh Amendment (R. 23-24).

1.

THE DISTRICT COURT AS A FEDERAL COURT WAS WITHOUT JURISDICTION UNDER SEC. 267 OF THE JUDICIAL CODE BECAUSE APPELLANT HAD A PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW

Under the local law, a suit will lie in the state court to recover taxes paid under protest.

Spaulding v. Adams County, 79 Wash. 193;

Puget Realty Co. v. King County, 50 Wash. 349;

State ex rel. Moore & Co. v. Superior Court, 97 Wash. 250;

Owings v. Olympia, 88 Wash. 289;

Wyckoff v. King County, 18 Wash. 256;

Carlisle v. Chehalis County, 32 Wash. 284;

Lewiston Water & Power Co. v. Asotin County, 24 Wash. 371.

This remedy is plain, adequate and complete.

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 57 L. Ed. 1288.

In the last mentioned case the court said (p. 485):

" 'The decisions of the state courts in cases of this kind are in conflict and we need not examine them. It is a mere matter of choice of convenient remedy for a state to permit its courts to enjoin the collection of a state tax because it is illegal or unconstitutional. Very different considerations arise where courts of a different, though paramount, sovereignty interpose in the same

manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable, and efficient as the remedy in equity'."

In *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 47 L. Ed. 651, it was observed that (p. 684):

"It has long been the settled doctrine of the Federal courts that the mere illegality of a tax, or the mere fact that a law upon which the tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law, but it must appear that the party has no adequate remedy by the ordinary processes of the law, or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc."

In *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269, 44 L. Ed. 159, the court said (p. 272):

"The rule is that the collection of taxes under

state authority will not be enjoined by a court of the United States on the sole ground that the tax is illegal, but it must appear that the party taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case within some recognized head of equity jurisdiction."

In *Dows v. Chicago*, 78 U. S. 108, 20 L. Ed. 65, it was declared that (pp. 109-110):

"There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.

"No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary pro-

cesses of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found upon examination, that the question of jurisdiction was not raised, or was waived."

In *Illinois Life Ins. Co. v. Newman*, 141 Fed. 449, the court said (pp. 450-451):

"It is conclusively settled by an unbroken chain of decisions emanating from the Supreme Court that federal courts of equity will not enjoin the levy or collection of a tax on the single ground of illegality, but that some special circumstance, such as the avoidance of a multiplicity of suits, the casting of a cloud upon title to real estate, or some injury that cannot be remedied by an action at law, instituted either before or after the payment of the tax, or other circumstance bringing the case within the well recognized principles of equity, must be averred in addition to the single fact of the illegality of the tax before a court of equity will take cognizance of the controversy and interpose by injunction."

The presence or absence of an equitable remedy in the state court furnishes no basis for equitable relief in the Federal Court to enjoin the collection of a *tax*.

Illinois Life Ins. Co. v. Newman, 141 Fed. 449, and cases there cited;

Arkansas Building & Loan Association v. Madden, 44 L. Ed. 159.

2.

THE DISTRICT COURT AS A FEDERAL COURT WAS WITHOUT JURISDICTION BECAUSE NO SPECIAL CIRCUMSTANCES ARE ALLEGED TO BRING THE CASE UNDER SOME RECOGNIZED HEAD OF EQUITY JURISDICTION.

This rule is announced in

Dows v. Chicago, 78 U. S. 108, 20 L. Ed. 65;

City Council of Augusta v. Timmerman, 233 Fed. 216;

Illinois Life Ins Co. v. Newman, 141 Fed. 449.

In the decision in the mortgagor's injunction suit, *Puget Sound Power & Light Co. v. Seattle, et al.*, 300 Fed. 441, the court said (pp. 442-443):

"The defendant county officers are not parties to the contract between the complainant and defendant city. There is no collusion shown between the defendant officers and the defendant city.

"The relief sought against the several defendants is totally distinct. That against the defendant officers is equitable; that against the defendant city is predicated on contract for payment of money, and therefore legal. *Cutler v. Iowa Water Co.* (C. C.) 96 Fed. 777; *Walker v. Pow-*

ers, 104 U. S. 250, 26 L. Ed. 729. The action is multifarious.

"Taxation is a right of sovereignty, and only by the payment of taxes can the sovereignty be maintained. Delay by tax collecting officers may derange operations of government, and thereby seriously interfere with public functions. *Dows v. Chicago*, 78 U. S. (11 Wall.) 108, 20 L. Ed. 65. The tax for which distraint is made is *admittedly valid and delinquent*. The defendant tax collecting officers are state officers collecting a state tax, and if acting within state statute are within the meaning of the Eleventh Amendment to the Constitution. In *re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216. Whether the tax here is a contract debt, payable out of the general fund and requiring submission to the electors (*Asia v. Seattle*, 119 Wash. 674, 206 Pac. 366), or an imposed obligation, payable out of the special utility fund (*Twitchell v. Seattle*, 106 Wash. 32, 179 Pac. 127; *Asia v. Seattle*, *supra*), need not be considered.

"There may be equities in favor of the plaintiff, but these equities do not outweigh the right of the sovereignty, or of the public, in being deprived of the necessary use of the public utility in the event of sale, in the absence of provision by ordinance for funds for the payment of the tax in controversy, when weighed against the contention of the plaintiff, one of the con-

tracting parties. The contract was entered into with seeing eyes, and understanding mind, as shown by the record and knowledge of the laws of the state. 'Taxes assessed upon personal property are a lien upon all * * * personal property of the person assessed' from the date of the assessment. Section 11272, Rem. C. S. The imposed duty of the defendant treasurer is to collect the personal tax, and, if not paid after notice, to prepare papers in distraint and file the same with the sheriff, who shall immediately, without notice or demand, distrain sufficient goods and chattels belonging to the person charged with such tax, etc. (the plaintiff is charged with the tax; the assessment was made before transfer), and sell such property after notice, pay to the treasurer the amount collected (section 11258, Rem. C. S.), and on the last day of each month the treasurer shall pay to the state treasurer the amount collected and credited to the various state funds (section 11265, Rem. C. S.), and before the 10th of each month turn over to the city treasurer all moneys collected the previous month (section 11322, Rem. C. S.).

"The tender or offer to pay one-fourth of the tax due by the plaintiff, or to pay either of the levies made for state, county, city or school purposes, cannot serve the plaintiff. There is no provision of statute known to us, nor has our attention been challenged to any, permitting such

payment. Each fund or levy is entitled to its pro rata when the tax is paid, and no officer has a right to accept tax tendered on a particular fund. The duty placed upon the collecting officers carries certain discretion, and in the exercise of that discretion, in the absence of statute, a court of equity may not legislate, by imposing its decree. The plaintiff has an adequate remedy at law. No special circumstances, such as multiplicity of suits, irreparable injury, or cloud upon title to real estate, is involved. *Does v. Chicago, supra; P. S. P. & L. Co. v. Asia et al.* (C. C. A.), 277 Fed. 1. The remedy may not be as speedy, but it clearly is legal and plain and adequate, and upon the record equity may not interfere."

(a) *No multiplicity of suits is involved.*

Montgomery v. Coulitz County, 14 Wash. 230;

Byrne v. Drain, 60 Pac. 433;

Stimson Timber Co. v. Mason County, 97 Wash. 205;

Cooley, Taxation (3d Ed.), pp. 1411, 1415, 1429.

(b) *No cloud upon title to real estate is involved.*

The tax must be a lien upon *real estate* to constitute a cloud upon the title.

Does v. Chicago, 78 U. S. 108, 20 L. Ed. 65, and note;

Pac. Express Co. v. Seibert, 142 U. S. 339, 35 L. Ed. 1035.

This tax is on personal property. The property distrained was "goods and chattels," all personality. The point is set at rest by

Puget Sound Power & Light Co. v. Seattle, 127 Wash. 351, 354, 355.

Puget Sound Power & Light Co. v. Seattle, 268 U. S. 22, 69 L. Ed. 541.

(c) *No irreparable injury is shown.*

Appellant is not the owner of the goods and chattels distrained, and is not in possession, nor entitled to the possession thereof.

Under the local law, a chattel mortgage does not convey to the holder any title to the property, but is only a security.

Silsby v. Aldridge, 1 Wash. 117;

Byrd v. Fuches, 3 Wash. Terr. 328;

Ephraim v. Kelliher, 4 Wash. 243, 29 L. R. A. 604;

Blanton v. Baker, 6 Wash. 50;

Sapsrud v. Nemec, 6 Wash. 87.

A mortgagee cannot demand possession of goods after the levy of an attachment.

Byrd v. Fuches, 3 Wash. Terr. 328.

If the lien of the Trust Company's mortgage were prior to the tax lien, then it will not be affected in any way by a sale of the property distrained. The court held in *Blanton v. Baker*, 6 Wash. 50, that (pp. 51, 52):

"* * * in *Silsby v. Aldridge*, 1 Wash. 117 (23 Pac. Rep. 836), that a chattel mortgage

under the statutes of this state does not convey to the holders of the mortgage any title to the property in question. The mortgage, then, being only a security, the mortgagee has no right in the property other than his right to foreclose. His lien has not been affected in any way by the sale of the property under the subsequent mortgage. All the interest that passed to Baker by virtue of his purchase of the horses was the interest that Taylor had in the horses, which was simply the equity of redemption. Taylor was entitled to the possession of the property under the terms of the mortgage, and Baker as the purchaser of Taylor's interest became entitled to this possession, and the complaint contains no allegation of either actual possession at the time of the alleged conversion, nor of right of possession, nor of demand of possession. We think the allegations of the complaint entirely insufficient to maintain the action, and that the judgment must be reversed, and the case remanded to the lower court with instructions to dismiss the action."

The purchaser at a tax sale takes what the statute provides.

Gustaveson v. Dwyer, 78 Wash. 336;

Kennedy v. Anderson, 88 Wash. 457.

The mortgagee does not owe this tax. It has no right to interfere with the enforcement of the tax. If the tax lien is paramount, the mortgage lien will

disappear on the sale, by operation of law. If the reverse is true, it will remain unimpaired in virtue of the statute. Submission to taxation is not an irreparable injury as that term is used by equity courts. If it were, every embarrassment of a taxpayer would be hailed before an equity court to avoid the burdens of taxation.

It is not alleged that the mortgagor's financial condition is such that it cannot pay this tax and meet the obligations of its mortgage when due. Even if such allegation were made it would be no basis on which to enjoin the distraint and sale, because it was held in

Steubenville, etc. R. Co. v. Tuscarawas Co., 22 Fed. Cases, No. 13388,

that the mortgagees and trustees of a railroad company cannot enjoin the state officers from seizing its rolling stock to enforce collection of taxes, even though the company cannot pay the interest on its mortgage bonds, and would be unable to replace the rolling stock if the same should be sold.

3

THE DISTRICT COURT AS A FEDERAL COURT WAS WITHOUT JURISDICTION UNDER THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BECAUSE THE STATE WAS DIRECTLY INTERESTED IN THE TAX

In this state, the sheriff and treasurer are not mere local officers of the County, but are independent

public officers with powers and duties imposed by statute.

Carter v. King County, 120 Wash. 536;
Kildall v. King County, 120 Wash. 472.

The tax is one consolidated tax.

After the assessments have been made for general tax purposes, and local boards of equalization have reviewed the same, they are further equalized by the State Board of Equalization.

Under Sec. 11224 Rem. Comp. Stat., the State Board of Equalization certified to the county assessor the *amount of state taxes*, and under Sec. 11170 its final equalized valuations.

Sec. 11170 further provides:

> "The county assessor shall in like manner distribute the value so certified to him, to the several cities, towns, road districts, school districts and other taxing districts, in his county, entitled to a proportionate value of the operating property of such railroad: and each assessment so apportioned shall be placed upon the tax-rolls of said county, and the taxes extended against the same, as against other property in said county, cities, towns, school, road, and other taxing districts."

Under Sec. 11231, county commissioners, city and town councils, and directors of school districts determine the *amount of such taxes* to be levied upon the current assessment rolls.

Under Sec. 11236 it is provided that:

"The county auditor shall extend the taxes upon the assessment books in the form herein prescribed. The *rate per cent* necessary to raise the required amount of the *total tax* for state, county indebtedness, county current expense, road, bridge, school, special school and incorporated cities, and all other county, school, municipal and state purposes, shall be computed on the assessed valuation as equalized by the county board of equalization as a whole, under the head of *consolidated tax.* * * * The *amount* of all taxes shall be entered in the proper columns, *as shown by entering the rate per cent of consolidated tax* and of such special tax at the head of the proper columns; on the first day of each month the county treasurer shall distribute pro rata, according to the rate of levy for each fund, the amount collected as *consolidated tax* during the preceding month, and shall certify the same to the county auditor." (Italics ours.)

This *consolidated tax* is payable, as to real estate under Sec. 11252, and as to personalty under Sec. 11258. Such consolidated tax, being the total current tax for a given year is a single tax payable as above prescribed. That each year's consolidated tax is treated as a separate entity is shown by Sec. 11255, which declares:

"The owner or owners of property against which there are delinquent taxes, shall have the

right to pay the *current tax* without paying any delinquent taxes there may be against said property; Provided, however, that in issuing a receipt for such *current tax* the county treasurer shall indorse upon the face of such receipt a memorandum of all delinquent taxes against the property therein described, showing *the year* for which said tax is delinquent and *the amount* of delinquent tax *for each and every year.*" (Italic ours.)

Sec. 11252, Rem. Comp. Stat., provides that:

"The county treasurer shall be the receiver and collector of all taxes extended upon the tax books of the county, whether levied for *state*, county, school, bridge, road, municipal or other purposes * * *." (Italics ours.)

It is alleged that the tax in this case was for "state, county, school district and city taxes." (R. 3.)

As to the State's portion of this total tax Sec. 11265, Rem. Comp. Stat., provides:

"Immediately after the last day of each month, the county treasurer shall pay over to the state treasurer the amount collected by him and credited to the various state funds * * *."

It will be seen, therefore, that under the local law, appellees Shields as treasurer and Starwich as sheriff are the public officers, and the only ones charged by law with the duty of collecting and enforcing the collection of total taxes for state and other purposes. They act for the State. It has a real and substantial

interest in the tax. When the tax is collected, the State's portion is covered into the state treasury. The tax is valid. Its enforced collection is under adjudicated local laws, not alleged to be violative of any provision of federal constitution or laws. These officers were not wrongdoers, acting individually, but public officers acting as such for the State, within and under the law.

The prohibition of the Eleventh Amendment applies

In Re Ayers, 123 U. S. 443;
Poindexter v. Greenhow, 114 U. S. 270;
Fitts v. McGhee, 172 U. S. 516;
Murray v. Wilson Distributing Co., 213 U. S. 151;
Smith v. Reeves, 178 U. S. 436;
Coulter v. Weir, 127 Fed. 897.

Appellant is a citizen of another state and the State of Washington is directly affected by this litigation, as a portion of the tax in question belongs to the State. Hence, this action comes within the prohibition of the Eleventh Amendment. This court has decided that if it appears on the face of the record that the State is a direct party in interest in the controversy, the Federal Courts have no jurisdiction as the court is not bound by the nominal parties on the face of the record.

In the case of *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. Ed. 185, 191, the court held that "the question whether suit is within the prohibition of the

Eleventh Amendment is not always determined by reference to the nominal parties on the record."

In the case of *Ex Parte Ayers*, 123 U. S. 492, 31 L. Ed. 216, 223, wherein the court followed the rule laid down in the case of *Poindexter v. Greenhow*, *supra*, the court said:

> "It must be regarded as the settled doctrine of this court, established by its recent decisions, 'that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record. *Poindexter v. Greenhow*, 114 U. S. 270, 287, 29 L. Ed. 185, 191."

The court further said in said case, in passing upon the question of jurisdiction of the Federal Courts where a State has a direct interest in the controversy, as follows:

> "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the

administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

Ex Parte Ayers, 123 U. S. 492, 31 L. Ed. 216, 229-230.

In the case of *Farmers' National Bank of Hudson v. Jones*, 105 Fed. 459, 462, the court, in considering the effect of the Eleventh Amendment to the Constitution of the United States, made the following comment:

"When the Supreme Court of the United States in *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440, decided that under the Constitution that court had original jurisdiction of a suit by a citizen of one state against another state, the Eleventh Amendment of the Constitution was

straightway adopted, taking away this jurisdiction. That amendment reads as follows:

" 'The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.'

"Since the adoption of this amendment, the contract of a state is substantially without sanction, except that which arises out of the honor and good faith of the state itself, and these are not subject to coercion. *Ex Parte Ayers*, 123 U. S. 443, 505, 8 Sup. Ct. 164, 31 L. Ed. 216. One claiming to be a creditor of a state is remitted to the justice of its legislature. It was once said by the Supreme Court of the United States that the Eleventh Amendment was limited to suits in which the state was a party to the record. *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204. But as a state can perform its functions through officers and agents only, it was soon perceived that, if these officers and agents of the state were liable to be sued and coerced to comply with the judgments and decrees of a federal court, the whole scope and purpose of the amendment would be nullified, and the doctrine of that case on this point has long ceased to be authority.

"It is now settled that the jurisdiction in such

cases is dependent upon the real, and not upon the nominal, parties to the suit, and it is now clear, both upon principle and authority, that a suit against the officers of a state to compel them to do acts which would impose a contractual pecuniary liability upon the state, or to issue any evidence of debt, in the name of the state, which would have that result, is in fact and legal effect a suit against the state, though the state itself is not named a party on the record."

Also:

Minnesota v. Hitchcock, 185 U. S. 386, 46 L. Ed. 954;

Tindall v. Wesley, 167 U. S. 213, 42 L. Ed. 137;

In re Tyler, 149 U. S. 164, 37 L. Ed. 689.

We therefore respectfully submit that the motion to dismiss should be granted.

BRIEF IN ANSWER TO BRIEF OF APPELLANT

Not waiving our motion to dismiss, we submit herewith our brief in answer to the brief of appellant.

I

THERE IS WANT OF JURISDICTION IN THE COURT AS A FEDERAL COURT

Appellant's first specification (p. 7) is for error in "dismissing the suit for want of jurisdiction in the court as a federal court." So is its fourth assignment of error (R. 24). The order of dismissal is "upon the ground that the court is without jurisdiction as a federal court" (R. 21). In certifying the question of jurisdiction to this court the District Court stated (R. 22):

> "* * * this certificate is made and granted and the question of the jurisdiction of the suit by the District Court as a Federal Court and the correctness of the ruling and decree of the District Court that as a Federal Court it was and is without jurisdiction to entertain the suit are hereby certified to the Supreme Court of the United States for decision upon such appeal."

The decisions upon this question as applied to tax cases are so numerous and so uniform against the jurisdiction as to make this appeal frivolous. On this point we respectfully adopt and refer to our

statement and to our argument and authorities under our second ground for dismissal (pp. 12 to 23).

Counsel may urge that the trial court intended to limit its decree and its question certified to the Eleventh Amendment. If so, why submit appellant's fourth assignment and first specification of error? Appellant has brought to this court the question of want of jurisdiction of the District Court as a federal court in this tax case. The lower court's decision thereon is manifestly correct. The case should be affirmed, even though it be held that the Eleventh Amendment did not prohibit the suit.

II

The District Court as a Federal Court Was Without Jurisdiction Under the Eleventh Amendment to the Constitution of the United States Because the State Was Directly Interested in the Tax

This point is embraced in appellant's second and third specifications of error (p. 7) and in its first three assignments of error (R. 23, 24). On this point we respectfully adopt and refer to our own statement and to our argument and authorities under our second ground for dismissal (pp. 22 to 31).

As to Tender

The original bill alleges that the sheriff stated he would not accept a tender of anything less than the

total tax with interest (R. 12). No tender was made of the whole amount or any other sum.

Under the local law one-half of the real estate taxes for a given year may be paid on or before June 1st of that year and the balance on or before November 30th following (Sec. 11252, Rem. Comp. Stat.).

A personal property tax must be paid by March 15th of the year following its levy, or the principal sum thereof becomes delinquent and bears 15 per cent interest (Sec. 11258, Rem. Comp. Stat.). No tender of the principal of the tax now before this court was ever made prior to its delinquency. Nor, after delinquency, was any tender of the principal with interest made, until June 7, 1924, when payment was made.

A tender, to be effectual, must be of the full amount of any single tax; it cannot be of anything less, unless the statute allows payment of a part by itself, as it does sometimes for the benefit of tenants in common or owners of distinct portions of the premises taxed.

Hunt v. McFadgen, 20 Ark. 277;
State v. Carson City Sav. Bank, 30 Pac. 703;
Heft v. Gephart, 65 Pa. St. 510;
Crum v. Burke, 25 Pa. St. 377.

The tender must be unconditional, be made to an officer authorized to receive the tax, and be for the full amount of the tax due, with any accrued interest, penalties or costs, except in cases where the assess-

ment is entirely void, when no tender at all is necessary.

State v. Central Pac. R. Co., 30 Pac. 686;
Edwards v. Upham, 93 Wis. 455, 67 N. W. 728;
Howell v. Hogins, 37 Ark. 110;
Hunt v. McFadgen, 20 Ark. 277;
State v. Carson City Sav. Bank, 30 Pac. 703;
Heft v. Gephart, 65 Pa. St. 510;
Crum v. Burke, 25 Pa. St. 377;
Joslyn v. Tracy, 19 Vt. 569;
Converse v. Jennings, 13 Gray (Mass.) 77;
Albany City Nat. Bank v. Maher, 9 Fed. 884.

Counsel (p. 20), cite Cooley on Taxation to the point that as to different taxes, the taxpayer has a right to pay any one separately and to contest the others. That is true under the local law as to taxes for different years (Sec. 11255, Rem. Comp. Stat.), but not so as to the *consolidated tax for any given year*, after such tax has been litigated by the taxpayer and adjudicated valid in a principal sum.

The cases cited by counsel (pp. 20-21), all relate to mortgages, mechanics' liens, vendors and purchasers and like inapplicable subjects, save alone *N. P. Ry. Co. v. Franklin County*, 118 Wash. 117. There the *legality* of part of the taxes was in issue. An unconditional tender and actual payment was made as to all but the part claimed to be invalid. It was accepted subject to the County's right to assert the legality of the contested part of the taxes, which

was finally held valid. The question then arose as to whether the taxpayer was subject to interest on its taxes or was entitled to the rebate allowed on real property taxes. The court held that, "the tender to have the effect of payment must be an unconditional tender" and that "the payment thus received absolves the taxpayer from any penalty upon that amount."

Moreover, a tender must be kept good by payment into the registry of the court. This the appellant did not do.

State v. Hoffmen, 201 S. W. 653.

The tax enforcing officers dealt with a tax—a total, consolidated tax—adjudged valid, payable only as the statute provides. They could not recognize the contract between the mortgagor and the city, nor accept less than the full tax with interest.

NO SET-OFF OR COUNTERCLAIM CAN BE INTERPOSED AGAINST TAXES

It was the duty of the tax enforcing officers to collect the tax in the full amount, without regard to the controversy between the company and the City.

The general rule is that a set-off or counterclaim cannot be interposed in an action for the recovery of delinquent taxes.

Newport, etc. Bridge Co. v. Douglass, 75 Ky. 673;

New Orleans v. Davidson, 31 Am. Rep. 228;

Camden v. Allen, 26 N. J. L. 398;

Morgan v. Pueblo, etc. R. Co., 6 Colo. 478;

Hawkins v. Sumter County, 57 Ga. 166;
Wayne v. Savannah, 56 Ga. 448;
Village of Charlotte v. Keon, 100 N. E. 1116.

It is well established that no right exists in law or equity to set-off against taxes a debt due to the taxpayer from the municipality to which the tax is payable. Taxes are levied to raise money for specific purposes, as indicated by the appropriations for the current year, and a taxpayer cannot, by exercising the right of set-off divert the taxes to another purpose, namely, the payment of the debt due to him. The strictness with which the rule is applied is seen in the cases which hold that illegal or excessive taxes paid in previous years cannot be offset against current tax demands.

26 R. C. L. 378;
37 Cyc. 1247.

The theory on which this rule of law rests is that tax demands are not in the nature of contracts between party and party, but are the positive acts of the government through its various agents, binding on the inhabitants, and to the making and enforcing of which their personal consent individually is not required.

Apperson v. Memphis, 2 Flip. 363, 1 Fed. Cases No. 497.

In holding that a court of equity would neither set-off a debt against a tax nor enjoin the collection of the tax until the debt which constituted the set-off or

counterclaim was paid, the court in *Finnegan v. Fernandina*, 15 Fla. 379, 21 Am. Rep. 294, said:

> "The amount which the citizen pays to the government through taxation is not regarded as the settlement of a simple contract or matter of indebtedness, capable of being accurately estimated in value in the same manner as an ordinary indebtedness existing between individuals. A public use, a public benefit to all and to each, is one of the essential ends sought to be obtained through such taxation. The public good, through the instrumentality of local municipal governments, exercising political, governmental and civil powers and functions, is the object sought to be attained, and the power of taxation is an essential means given to reach this end. A court of equity should not assume such powers as would, in any event, embarrass the attainment of these ends by the corporation. To enjoin the collection of municipal taxes due upon property owned by individuals, to the extent that there is a debt from the city to such individuals, is the exercise of a power of appropriation and interference with public trusts and the exercise of delegated sovereign powers which has not received the sanction of any court. The amount of the tax is not strictly a debt due by the person. Its collection is enforced without suit, and in many other respects there is a difference (7 Wall. (U. S.) 80). It is a burden

imposed upon property, the return for which it is presumed the taxpayer receives in the matter of benefit through police regulations and other results incident to municipal government."

The application of the rule is seen in the cases which hold that illegal or excessive taxes paid in previous years cannot be offset against current tax demands.

Wayne v. Savannah, 56 Ga. 448;

People v. Chicago & A. R. Co., 247 Ill. 458, 93 N. E. 298;

New Orleans v. Davidson, 30 La. Ann. 541, 31 Am. Rep. 228.

In *Hedge v. Des Moines*, 141 Ia. 4, 119 N. W. 276, the court said (p. 283):

"A special assessment is a tax. * * * A tax is not liable to counterclaim or set-off, nor is it subject to attachment or execution * * *. Under this rule, even if the special tax in question had been levied for the benefit of the defendant city, the plaintiffs could not extinguish them by interposing against them valid counterclaims against the city. Taxes are usually levied for particular purposes, and are carried in the public treasuries in separate and particular funds. It is essential to the machinery of government that they be collected and applied to the particular purposes for which they are levied. If they may be waylaid by the creditors of the municipality and seized by attachment or execu-

> tion, or if the taxpayer may set-off against them his counterclaims against the municipality, then the special purposes of taxation are thwarted, the power of the government to accomplish its ends is checked, and the orderly conduct of public affairs through the machinery of government may be rendered quite impossible. Parties, therefore, who have alleged claims against the assessing municipality, must pursue their ordinary remedy in the courts by independent action."

To the same effect is the language of the court in *Burlington v. Palmer*, 67 Ia. 681, 25 N. W. 877, wherein the court, in denying the right of the defendant to set up a counterclaim in an action brought by a city to recover a special tax, said (p. 878):

> "The tax is levied in the exercise of governmental authority conferred by the state upon the city and is to be expended for special purpose demanded by the wants of the public. Surely the taxpayer has no right to divert the revenue raised by the tax to purposes other than those for which it was levied. Did he possess such authority, the public would be deprived of benefits which municipal governments are intended to promote. If a tax levied to macadamize a street may be diverted to the liquidation of damages sustained by the taxpayer by reason of the negligent performance of the work, it is plain that the revenue might be appropriated

to a purpose other than that prescribed by law. But this the courts will not permit. The tax is set apart for the improvement—it cannot be disbursed for other purposes. Defendant's claim for damages is to be paid out of the general fund of the city. If he may plead it as a counter-claim, the special fund would be devoted to general purposes. This the law will not permit."

The general law is well settled that no set-off is admissible against demands for taxes levied for general or local governmental purposes.

Scobey v. Decatur County, 72 Ind. 551;

Finnegan v. Fernandina, 15 Fla. 379, 21 Am. Rep. 294.

In *Gatling v. Carteret County*, 92 N. C. 536, 53 Am. Rep. 432, in holding that an indebtedness of a municipal corporation cannot be set-off against an amount owed for taxes, either in law or equity, the court said:

"To accord to the courts of chancery the power to interfere with taxation by interposing to set-off the indebtedness of the government against the taxes might greatly embarrass the operation of its machinery, if not clog its very wheels. The courts of chancery are therefore not clothed with any such power."

In *Anderson v. Mayfield*, 93 Ky. 230, 19 S. W. 598, and in *Cobb v. Elizabeth City*, 75 N. C. 1, both of

which involved similar facts, the same conclusion was reached.

And in *Camden v. Allen*, 26 N. J. L. 398, in holding that a tax was not liable to set-off, the court said that to permit such set-off "would be utterly subversive of the power of government, and destructive of the very end of taxation."

In *Newport & C. Bridge Co. v. Douglass*, (12 Bush) 75 Ky. 673, in holding that an alleged indebtedness for transportation of troops for the government could not be set-off against the taxes levied by the state for the support of its government, the court said:

> "In the imposition of taxes, the state acts in its sovereign character; and where it finds it necessary or convenient to resort to the courts to enforce the performance of the public duty, or the satisfaction of the public burden resting on the taxpayer, it cannot be met and defeated by an ordinary plea of set-off. This public duty is absolute and imperative. The tax is not a mere debt due from the citizen to the government, and the courts have no power to treat it as a debt, without the express sanction of the legislature."

And in *McCracken v. Elder*, 34 Pa. 239, it was held that a claim for damages arising out of a breach of contract could not be set-off against school taxes in an action to recover such taxes.

So, a claim for the use of a railroad during war cannot be set-off in an equitable suit by the United

States to recover taxes assessed against the railroad company.

United States v. Pacific R. Co., 4 Dill. 66, Fed. Cas. No. 15983.

Nor can a claim for services rendered be set-off against a borough in an action by it to recover from a tax collector the balance of a school tax.

Wilson v. Lewistown, 1 Watts & S. 426.

In *Aplin v. Van Tassel*, 73 Mich. 28, 40 N. W. 847, it was held that the county treasurer could not counterclaim a county claim against the state in a suit by it to compel him to pay over taxes collected by him, especially as the statutory duty of the treasurer was absolute and specific as to paying over public moneys, although the board of supervisors of the county had attempted to authorize him to pay over no money until the county was credited with the amount claimed. The court said that the county treasurer was acting directly for the state, and that a set-off was as direct an exercise of an affirmative jurisdiction as a suit, and could not be pleaded when not authorized by statute:

> "The treasurer, in making the collection, acts, so far as state taxes are concerned, for the state, and for no other body. The supervisors have no more control over the money in his hands than if it were in the state treasury. It is a distinct trust fund, and can no more be stopped there, and devoted to county purposes, than it could be attached or garnished for the county, or for

any one to whom the county is indebted. There is no point of view in which this money can be allowed to be impounded or retained in his hands which does not involve every element of a suit against the state. It would be a very dangerous doctrine to allow the revenues of the public to be tampered with while in process of realization."

Aplin v. Van Tassel, 73 Mich. 28, 40 N. W. 847, 849;

Aplin v. Board of Supervisors, 73 Mich. 182, 41 N. W. 223;

Auditor General v. Bay County, 106 Mich. 662, 64 N. W. 570.

are to the same effect.

The basis of the *Aplin* case is that the county treasurer is an independent public officer, which rule is recognized in this state in

Kildall v. King County, 120 Wash. 472;

Carter v. King County, 120 Wash. 536.

It has been held that over-payment of taxes made by a debtor cannot be set-off against the taxes of the following year, as taxes, for reasons of public policy, are not such demands as admit of pleas in compensation.

New Orleans v. Davidson, 30 La. Ann. 541 and 554.

So in *McVeigh v. Lanier*, 50 Ark. 394, 8 S. W. 141, it was held that an over-payment of taxes can-

not be made a set-off in favor of the land owner against subsequent taxes.

And in *Wayne v. Savannah*, 56 Ga. 448, it was held that property holders who have paid, whether voluntarily or by coercion, illegel taxes in former years, have no right to set-off such payments against executions issued for the taxes of later years.

And in *Hawkins v. Sumter County*, 57 Ga. 166, it was said that a municipal or county corporation must be allowed to collect its revenues for local government upon principles of public policy, and that the courts will not favor any interruption of such collection by affidavit of illegality claiming set-off. See also, to the effect that illegal taxes paid by mistake cannot be set-off against unpaid taxes:

People ex rel. Graff v. Chicago & A. R. Co., 247 Ill. 373, 93 N. E. 424;

People ex rel. Graff v. Chicago, B. & Q. R. Co., 247 Ill. 340, 93 N. E. 422.

Another class of cases, which supports the general rule, is based upon the principle that taxes are not in the nature of contracts between party and party, but grow out of a duty to and are the positive acts of the government, to the making and enforcing of which their personal consent individually is not required.

Apperson v. Memphis, 2 Flip. 363, Fed. Cas. No. 497;

Anderson v. Mayfield, 93 Ky. 230, 19 S. W. 598;

Keep v. Frazier, 4 Wis. 245.

And in *Charlotte v. Keon*, 128 N. Y. Supp. 80, it was held that in an action by a village for delinquent taxes, a counterclaim for a debt due from the village is not available, it being said that the action is brought by the village in its governmental capacity rather than as an individual upon a contract.

In *Bell v. Mobile & O. R. Co.*, 4 Wall. 598, it was held that it was no part of the sheriff's duty to settle differences that had arisen or might arise between the county and its taxpayers, the court observing,

> "It was no part of his business to sit in judgment on the proceedings of the Board of Police, nor was he at liberty to constitute himself an arbiter to settle the differences that had arisen or might arise between the county, the taxpayers and the company."

That no set-off or counterclaim is allowed against taxes is well stated in Cooley on Taxation (4th Ed.) Sections 22, 1335 and 1336.

DISTRAINT AFTER BILL FILED

The distraint made by the sheriff after the filing of the bill was not an abuse of process for the reason that he was proceeding strictly in compliance with the provisions of the state law. In the absence of any restraining order he was entitled to proceed just the same as if this suit had been instituted in the state court and no restraining order issued.

The rule is that jurisdiction of a federal court

will be protected, after the bill if filed against any suit brought later in the state court, if the *res* will be affected by the decree in the federal court. That is, the property itself must stand subject to a decree in the federal court affecting its disposition. If it does, then a later suit in a state court will not affect the jurisdiction of the federal court. But that question is not involved in this case for the reason that distraint by the sheriff is not a suit or action in the state court. It is simply the act of an independent public official making an enforced collection of taxes in strict compliance with the statute. This raises no question of conflict of jurisdiction. The issue would be the same if plaintiff had gone into the state courts for an injunction. Since there is no conflict of jurisdiction, the sole question is, in either court: Can an officer act in the performance of his duty until enjoined, or must he stop upon the filing of a suit to enjoin in any court?

To illustrate, if appellant had gone into the state court prior to distraint, would the state court be compelled to treat the distraint so made as an imposition on the dignity of the court, when appellant could have secured the protection of the state court by a restraining order upon tender into court of the amount of the tax?

The sheriff's own conduct here shows the greatest respect for the authority of the court rather than any lack of respect, for he could have made actual physical seizure of a considerable part of the prop-

erty distrained, could have moved it away and deprived the owner of its custody and use. As a matter of fact, he simply made a constructive seizure by serving and posting the notices of distraint. This fact when considered in connection with the fact that it was a matter of common knowledge that such distraint was contemplated and that the papers were being prepared and the further fact that appellant had several notices that the distraint would be made, with ample time to secure a temporary restraining order, if it was entitled to one, leaves it no equitable ground for complaint against the conduct of the sheriff, who was simply proceeding to collect this valid tax in the same manner as he would proceed to collect any other tax.

AS TO DISTRAINT OF MORTGAGED PROPERTY FOR TAXES

The cases cited by counsel (pp. 14-15) do not aid appellant. The following principles govern the case on this point. The property of a taxpayer must submit to the burden of taxes. Under the local law personal property taxes are a lien on the specific property assessed and are a debt of the person assessed. In the enforcement of such taxes distraint may be made either against the specific property assessed or against any goods and chattels belonging to the taxpayer.

It is immaterial to the distraining officer whether the lien of any mortgage on the goods distrained is prior to the tax lien or not. If not, the mortgage

lien is destroyed with the enforcement of the tax lien. If the mortgage lien is superior to the tax lien, then the only title conveyed by the sheriff's sale is the interest of the taxpayer.

Binnian v. Baker, 6 Wash. 50.

In neither event can the mortgagee prevent the enforcement of the tax lien against goods and chattels in the hands of and owned by the mortgagor.

> "In making the distraint, the treasurer (now the sheriff) is not limited to the property assessed, but *may distrain any personal property belonging to the tax debtor within the county, sufficient in amount to meet the taxes, together with interest and costs.*" (Italics ours.)

Porter v. Yakima County, 77 Wash. 300.

The cases cited by counsel (pp. 14-15) rest on different facts and do not disturb the rule. The facts in the quoted case (p. 15) *Goodsell v. Spokane County*, as stated by the court show its inapplicability, the opinion observing:

> "The question in this case may be stated thus: Where various articles of personal property, of unequal value, have been assessed to A, as owner, for taxation purposes, the assessment and valuation being made of the property as a whole or in bulk, and tax has been levied thereon and thereafter a part of the property is sold to B, and A does not pay any portion of the tax, can the whole thereof be made out of the part of

the property owned and held by B at the time of distraint?"

Goodsell v. Spokane County, 35 Wash. Dec. 476.

Counsel state (p. 11):

"In the case at bar the suit was to restrain two *municipal corporations* and *their officers* from *violating* the *law* of the *state to the irreparable injury of* appellant." (Their italics.)

What law? None is pleaded or cited nor do we know of any such law. There is no tort involved in this case. They are independent public officers collecting and enforcing the collection of a total tax for state and other purposes. The state is directly interested. The tax officers cannot accept less than the total tax with interest. They can allow no offset or counterclaim. Neither they nor King County were party to the sale of the street railway system to the City of Seattle.

Their refusal to be drawn into the controversy between the Company and the City makes them guilty of no wrongdoing. The state is a party in a substantial sense, represented by its tax enforcing officers *as officials*. None of the cases cited by counsel (pp. 9-12) are tax cases. Those against officers involve acts contrary to law, for which acts the officials, as individuals, may be sued irrespective of the Eleventh Amendment.

III

THE ORIGINAL AND SUPPLEMENTAL BILLS OF COMPLAINT ARE MULTIFARIOUS AND THE PARTIES DEFENDANT THEREIN ARE MISJOINED

In both the original and supplemental bill appellant seeks to enjoin all of the defendants from distraining and selling for taxes the property of the Puget Sound Power and Light Company, and further seeks to compel the City to comply with the proviso in the purchase contract between the mortgagor and the City. The County and its officers are not parties to such contract and are not concerned therewith. The City is in no wise concerned with the distraint.

In the suit for injunctive relief, the City is neither an indispensable, necessary nor proper party, and in the application for specific performance, the County and its officers are neither indispensable, necessary nor proper parties. Specific performance will not lie to compel the payment of money only. The remedy is a suit at law.

Heine v. Board of Levee Comrs., 19 Wall. 655, 22 L. Ed. 223;

Raton Water Works Co. v. Raton, 174 U. S. 360, 43 L. Ed. 1005.

Rule 26 of the Rules of Practice in Equity in the Federal courts does not permit the joining of an equitable proceeding with that of an action at law, particularly when the defendants in such bill are unrelated as they are in the action at bar.

The following cases sustain this contention:

"While the equity and law sides of the Fed-

eral Court are merely different sides of the same court, it is entirely clear that separate claims which are distinctly of equitable and legal cognizance cannot be litigated in the same suit but must be maintained in separate suits."

Bucyrus Co. v. McArthur, 219 Fed. 266, 271.

"Misjoinder of parties plaintiff having no interest and to whom no relief can be granted renders the bill of complaint multifarious and devoid of equity. Nor does it appear from the complaint that appellants have any community of interest in the causes of action alleged, and unless some such interest appears they may not be joined in one bill against the appellee. A bill states different causes of action where it seeks to enforce distinct and separate rights of different plaintiffs and distinct and separate liabilities of different defendants. *Hale v. Allison*, 188 U. S. 56, 47 L. Ed. 380."

DeCroisset, et al., v. Vitigraph Co. of Am., et al., 262 Fed. 100, 102.

"The first is strictly a suit in equity seeking special relief which only a court of chancery can grant.

"The second is an action at law for the recovery of real property with the rents and profits. The two cases are entirely different in their nature and can be determined, where the distinctions between legal and equitable proceedings are maintained, only in separate suits. In

the one case if the allegations of the plaintiff must be sustained, the judgment must be declaratory and prohibitory, judging that the deed of the sheriff to the defendant constitutes a cloud upon his title and enjoining the defendant from asserting any claim to the premises under it. In the other case, if the defendant establishes his averments, the judgment must be for the possession of the premises and the rents and profits. In the Federal Court such a blending of equitable and legal causes of action in one suit is not permissible under the Process Act of 1792, substantially re-enacted in the Revised Statutes, which declares that in suits in equity in the Circuit and Districts Courts of the United States the forms and modes of proceeding shall be according to the principles, rules and usages which belong to courts of equity. 1 Stat. at L. 276, Sec. 2; R. S., Sec. 913. This requirement has always been held obligatory upon parties and the court whenever the question has been raised. *Thompson v. R. R. Co.*, 6 Wall. 134; 18 L. Ed. 765. A party who claims a legal title must therefore proceed at law, and a party whose title or claim is an equitable one must follow the forms and rules of equity proceedings as prescribed by this court under the authority of the Act of August 23, 1842. 5 Stat. at L. 518, Sec. 6."

Hurt v. Hollingsworth, 100 U. S. 100, 25 L. Ed. 569, 570.

"The bill is clearly multifarious. 'By multifariousness in a bill is meant improperly joining in one bill distinct and independent matters and thereby confounding them, as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant.' Story's Eq. Plead. (10th Ed.), § 271. The joinder of distinct and independent matters, each of which would constitute a cause of action, in the same bill brought by a single complainant against the same defendant. * * * No general rule can be laid down as to what constitutes multifariousness. The court must exercise a sound discretion in determining from the circumstances of each case whether the bill is liable to that objection."

State Trust Co. v. Kansas City P. & G. R. Co., 128 Fed. 129.

"It is enough to say that the real objection to the complaint is that the plaintiff has attempted to unite an action at law with a suit in equity as under the state practice and the courts he is permitted to do, but that practice does not prevail in this court. The plaintiff may bring his action at law against the Sullivan-Kelly Co. to recover the sum of money alleged to be due, and it may also bring a suit against the defendant corporation and Devlin to subject the assets in

the possession of Devlin to the payment of any judgment that may be recovered against the corporation; but it cannot unite a suit in equity with an action at law in the same complaint. The distinction between the law and equity must be observed in all actions or suits brought in the United States court. The equity jurisdiction of the courts of the United States is derived from the constitution and laws of the United States. The practice is regulated by the various courts and by the rules established by the Supreme Court affected by any state legislation. *In the United States courts the union of equitable and legal causes of action are not allowed. These general principles are too well settled to require an extended discussion.*"

Coit & Co. v. Sullivan-Kelly Co., et al., 84 Fed. 724-725.

"By multifariousness 'Is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them. As, for example, uniting in one bill several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill.' Story Eq. Pl., Sec. 271. In Daniel's Ch. Pr., 335, it is said in explanation of this, that 'It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of

the suit and, nevertheless, those transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records'."

Walker v. Powers, 104 U. S. 250, 26 L. Ed. 729, 731.

"In other words, one cause of action is against one defendant at law and the other cause of action is against both defendants in equity. In my opinion, for these reasons the bill is multifarious and the demurrer should be sustained."

Thornton N. Mottley Co. v. Detroit Steel & Spring Co., et al., 130 Fed. 396.

Also, see:

Hayden v. Thompson, 67 Fed. 273;
Leslie v. Leslie, 84 Fed. 70;
Inman v. N. Y. Inter. Water Co., 131 Fed. 997;
Merriman v. Chicago & E. I. R. Co., 64 Fed. 535.

Nor is the multifariousness of the bill cured, or the misjoinder of the parties justifiable, by reason of the allegation in the bill that the City had entered into a combination and conspiracy with certain county officers whereby the County was to collect the tax (which was its duty anyway), and that by reason thereof it is necessary for the plaintiff to have discovery concerning such combination and agreement. The City speaks, and can speak, by ordinance only, and where it is sought to charge the City with the activities of administrative officers it is necessary

to allege that their unlawful acts were done pursuant to ordinance.

Hotel Cecil Co. v. Seattle, 104 Wash. 460, 462, 177 Pac. 347;

Puget Sound Power & Light Co. v. Seattle, 271 Fed. 958, 963;

Puget Sound Power & Light Co. v. Seattle, 330 Fed. 441, 443, 446.

Nor does the bare allegation of fraud, concealment or conspiracy justify a bill of discovery in equity in a cause that is really an action at law.

Whitehead v. Shattuck, 138 U. S. 146, 151, 34 L. Ed. 873;

So. Penn. Oil Co. v. Miller, 175 Fed. 729, 735;

Hayden v. Thompson, 67 Fed. 273, 276.

There being accorded the plaintiff the right under the "conformity act" to probe the minds and consciences of the adverse parties by way of interrogatories authorized under state law, a pure bill of discovery cannot be maintained in the Federal courts because it is no longer necessary.

Safford v. Ensign Mfg. Co., 120 Fed. 480, 482, 483.

IV

The Application by the Appellant in Its Supplemental Bill of Complaint For Subrogation by Reason of the Facts Should Not Be Granted

Appellant prays to be subrogated to the authority and rights of the County in the collection of the tax

in question, in the event that it becomes necessary for it to pay such tax in order to protect its interest as mortgagee, a contingency which can never take place, as the tax is paid. Appellant not being compelled to pay the tax to protect its interest as mortgagee, there is no reason in equity or otherwise to extend the equitable doctrine of subrogation. Subrogation must be denied in any event for the following reasons:

(a) That appellant has not been compelled to pay the tax or any portion thereof;

(b) That under the facts existing, subrogation would be against the broad principles of public policy; and

(c) Subrogation being an equitable remedy should be denied where there is a plain, complete and adequate remedy at law.

Now as to these propositions:

(a) *The appellant company has not paid the tax nor any portion thereof.*

If subrogation is permitted at all, it should only be permitted in favor of the mortgagor which paid the tax.

(b) *Under the facts existing, subrogation would be against the broad principles of public policy.*

Subrogation is, in practice, the substitution of one person in the place of another, and the substitute in all respects is put in the place of the party to whose rights he is subrogated. It is a doctrine which will be applied only according to the dictates of equity

and good conscience and considerations of public policy. The court should hesitate to apply this doctrine to cases where the substitution would result in conferring upon individuals rights and powers peculiarly designed for, and adapted to, public purposes.

In the case of *Sperry v. Butler*, 53 Atl. 899, 900, a case in which the plaintiff therein endeavored to invoke the doctrine of subrogation for the payment of a tax, the court said as follows:

> "The plaintiff, in support of his contention in his appeal, invokes the doctrine of subrogation. He says that by his payment of taxes and assessments he has become subrogated to the rights of the municipalities to which payment was made under the liens which existed in their favor. Let us first inquire to what extent, if at all, such subrogation may be had in favor of a private individual. Tax liens are a part of the governmental machinery provided by law to secure public revenues. The operation of this machinery of taxation is placed in the hands of public officials. The powers conferred upon them are in many respects arbitrary and summary. They find their justification in the necessities of government, and their palliation in the fact that public officials alone are intrusted with their exercise, and that they can be used to subserve public ends alone. These powers are oftentimes such as ought not to be at the command of private individuals, and subject to their

caprice, greed or malevolence. Take, for example, the powers which exist in favor of the public in the matter of the collection of taxes. The public representatives may immediately, after demand, summarily levy upon estate or body. Clearly, these are powers which individual ought not to have over individual. They were devised and intended for the welfare of the organized public, and not to be passed about from man to man. The plaintiff asks to be subrogated to the public right to foreclose. The City of Hartford and the school district to whom the taxes in question were paid were vested with other rights to secure the collection of the taxes due them. By the same arguments advanced to justify the right now contended for, the right of the plaintiff to avail himself of any of the summary means at the command of the city or school district to enforce the payment of their claims would be supported. Subrogation, to quote the contention of the plaintiff's brief, is 'the substitution of one person in the place of another. * * * The substitute is put in all respects in the place of the party to whose rights he is subrogated.' The argument goes to the full extent of full and complete substitution, to-wit, the vesting in the substitute of all the powers of the party whose place is taken. This argument overlooks the important facts that subrogation is an equitable, and not a legal, right.

Its foundation, it is said, is on equity and benevolence. *In re Wallace's Estate*, 59 Pa. 401. It is a doctrine, therefore, which will be applied, or not, according to the dictates of equity and good conscience, and considerations of public policy. When the case is one of the subrogation of the individual to public rights and remedies, the situation assumes an aspect not presented where the substitution relates to private rights. Questions of public policy—questions as to the propriety of turning over the governmental machinery to individuals, and conferring upon them the powers of the organized public—at once arise. The inquiry becomes one not of legislative power to provide for a complete or partial substitution, but one of judicial discretion in the administration of equitable principles under equitable considerations. *So it is that the courts ought to hesitate, and have hesitated, to apply the doctrine of subrogation to cases where the substitution would result in conferring upon individuals rights and powers peculiarly designed for and adapted to public purposes*, and as a part of the governmental machinery, without statutory sanction, express or implied. *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. 863; *Griffing v. Pintard*, 25 Miss. 173; *Trust Co. v. Hart*, 22 C. C. A. 473, 76 Fed. 673, 35 L. R. A. 352; *In re Wallace's Estate*, 59 Pa. 401. The power of taxation is one of the drastic pow-

ers exercised by governmental bodies. Its machinery is skilfully designed to accomplish the desired results most certainly and effectually. It is adapted to its uses, but not to private, unrestrained exercise. Therefore it is that, in the absence of legislation expressly or by reasonable implication authorizing the substitution of the individual for the community, the powers specially created as incidental to the exercise of the public right of taxation ought not to become delegated to private persons by judicial intervention, unless, indeed, it be in rare and extreme cases."

The machinery for collecting taxes may not be turned over to a stranger. Sound public policy forbids it.

"In every case we have been able to find subrogation is applied under the authority of particular statutes or on the ground that the assignment was made to protect some property right. We are not therefore disposed to hold that all the machinery for collecting taxes may be turned over to an entire stranger in interest under and by virtue of a mere agreement made with the owner of the property. In our opinion, sound public policy forbids it. Powers intended to be exercised by public officers would be conferred upon private individuals."

Gibson v. Western, etc. Life Ins. Co., 171 S. W. 390, 392.

"The collector claimed the right to be subrogated to the lien of the state, but the right was denied. The court said, in substance, that it might well be doubted whether a person could ever claim subrogation to the rights of the state as respects a lien for taxes, but that such right could not be claimed where the payment of taxes was voluntary, nor where subrogation, if allowed, would prejudice the rights of a third party, such as a subsequent judgment creditor."

Mercantile Trust Co. v. Hart, 76 Fed. 673, 676.

See:

Mersich v. Hartford, etc. R. Co., 55 Atl. 664;
Preston v. Wright, 17 Atl. 128.

(c) *Subrogation is an equitable remedy and should be denied where there is a plain, complete and adequate remedy at law.*

Subrogation is an equitable action. It therefore follows that if the appellant company has a plain, complete and adequate remedy at law, the court was correct in granting the motion to dismiss the bill and supplemental bill of complaint.

It has been held in the case of *Myers v. Sierra Val. Stock & Agricultural Assn., et al.*, 55 Pac. 689, that if the plaintiff has a plain, complete and adequate remedy at law, subrogation is not the proper remedy. The court said, on page 691, as follows:

"Respondents contend that, although they had a remedy at law, still there was concurrent jurisdiction in equity—and Mr. Pomeroy's Equity

Jurisprudence (section 139) is cited. But the author there says: 'The fact that the legal remedy is not full, adequate, and complete is, therefore, the real foundation of this concurrent branch of the equity jurisdiction.' *Where the remedy is a mere recovery of money, the case does not come under the concurrent jurisdiction, but comes within the sole cognizance of the law,* unless the right of action is dependent upon, or is in some way connected with, some equitable feature or incident, such as fraud, mistake, accident, trust, accounting, or contribution, and the like. Id. § 178. It was said in *De Witt v. Hays*, 2 Cal. 463, that, 'to entitle the plaintiff to the equitable interposition of the court, he must show a proper case for the interference of a court of equity, and one in which he has no adequate or complete relief at law.' And Mr. Pomeroy says at section 354: 'If, therefore, the facts stated in the pleadings show that the primary rights, the cause of action, and the remedy to be obtained are legal, then the action is one at law, and falls within the jurisdiction at law.' The action here was avowedly to obtain contribution from the stockholders, but this contribution, as we have seen, was a statutory right, which was enforceable by a simple action in assumsit, in which full and adequate relief was obtainable. The complaint must be treated as stating an

action at law, and the court, therefore, was without jurisdiction."

" 'Equitable subrogation' implies that there is no adequate remedy at law, but here the remedy is not only adequate, but it is plain, simple, and speedy."

Carstenbrook v. Wedderien, 94 Pac. 372, 373.

See:

McGee v. McManus, 12 Pac. 451.

CONCLUSION

Appellees respectfully submit

(1) That the motion to dismiss should be granted, and if not,

(2) That the decree of dismissal should be affirmed.

Respectfully submitted,

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